No. 96-628 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1996

JOHN KEANE, Superintendent, Sing Sing Correctional Facility,

Petitioner,

against

OSCAR BORIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit was correct in determining that trial counsel was constitutionally deficient by failing to give *any* advice to respondent as to whether to accept a proffered plea bargain when counsel believed it was suicidal to reject the plea and go to trial?

2. Whether the Second Circuit's holding that effective assistance of counsel includes counsel's informed opinion as to what plea should be entered constitutes a new rule within the meaning of *Teague v Lane*, and whether the District Attorney waived this argument by failing to present it to the District Court or to the Second Circuit until a motion for reargument?

3. Whether the Second Circuit correctly determined that the "Antiterrorism and Effective Death Penalty Act of 1996" does not apply retroactively to habeas corpus petitions not involving death sentences filed prior to the statute's enactment?

4. Whether trial counsel's uncontroverted repeated admissions that he did not advise respondent as to whether to accept the proffered plea bargain under the circumstances of this case constituted a sufficient record upon which the Second Circuit based its decision?

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BRIEF IN OPPOSITION TO THE PETITION

SUMMARY OF THE ARGUMENT

The Second Circuit correctly determined that trial counsel (Gary Greenwald) was constitutionally ineffective by failing to give *any* advice to respondent as to whether to accept the proffered plea bargain when counsel believed it was suicidal to reject the plea and go to trial. This holding was based upon uncontroverted repeated admissions by Greenwald during his lengthy testimony during the post-conviction hearing that he did not give any such advice to respondent and that he, Greenwald, believed that in the circumstances of this case it would be suicidal to go to trial. The District Attorney's argument to this Court is based upon repeated mischaracterizations of this holding.

First, the District Attorney falsely states that the Second Circuit held that trial counsel now have a Sixth Amendment duty to *convince* a client to accept a plea when the client professes his innocence. So that there would be no doubt that this is *not* the holding, the Second Circuit's July 17, 1996 opinion—which denied the District Attorney's motion to reargue—clarified its initial opinion as follows:

> The initial opinion in this case did *not* hold that it is constitutionally ineffective assistance of counsel when a lawyer's advice regarding the wisdom of accepting or rejecting a plea offer fails to convince the client. We held only that the absence of any advice constitutes ineffective assistance of counsel, and that under the circumstances of this case (where, the lawyer believed that rejecting the plea was suicidal, and there was a vast disparity between the sentence to be served upon rejec-

> tion of the plea offer and subsequent conviction) the absence of the advice prejudiced the client.

App. 43, n 2.

Thus the District Attorney insists upon misstating the Second Circuit's holding when he tells this Court that (1) the holding below indicates "that Greenwald's representation violated [respondent's] federal right to counsel because Greenwald failed to recommend acceptance of what it deemed to be a beneficial plea offer, failed to take stronger steps to overcome [respondent's] resistance to accepting such a plea, and failed to enlist the assistance of [respondent's] family members to obtain that result", (2) "the Second Circuit has created a new rule that counsel, in dealing with a client who adamantly professes his innocence, must nonetheless persist in recommending acceptance of a plea offer which counsel deems beneficial but which the client has already vowed to reject", and (3) "the Second Circuit would now require counsel to convince a client, who maintains his innocence, to plead guilty, and to enlist the client's family members' assistance in achieving that result." Petition, pp 6-8.

These repeated misstatements by the District Attorney of the Second Circuit's holding, read in conjunction with the District Attorney's inexcusable failure to even mention the July 17th clarification, can only be interpreted as a deliberate attempt to mislead this Court.

Second, the District Attorney fails—through no fault on his part—to bring to this Court's attention the corrected opinion of the Second Circuit, dated October 25, 1996 which incorporated Errata duly filed May 21st and July 11th, 1996. This Errata deleted the following language from the Second Circuit's initial

opinion (Petitioner's App. 9), language that quoted the Trial Manual 5 for the Defense of Criminal Cases:

> and often counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty in a case in which a not guilty plea would be destructive.

Errata of the Second Circuit, annexed hereto at Respondent's Appendix 1. A copy of the Second Circuit's corrected opinion is annexed hereto at Respondent's Appendix 2.

The fact that this language was deleted makes it clear that the Second Circuit did not declare a duty to *persuade*, and that its holding rests solely upon counsel's duty to *advise*. Thus the District Attorney's reliance upon this quoted language at p 13 of his Petition is, albeit unknowingly, misplaced.

Along with his mischaracterizations of the holding below, the District Attorney refuses to acknowledge the salient and distinguishing point of this case: Greenwald repeatedly testified that he did not give respondent *any* advice on whether to accept the proffered plea. This allows the District Attorney to trumpet a false alarm to this Court that the Second Circuit "will require the federal courts to review vast numbers of challenges to state criminal convictions that would have been barred under previously settled principles of law." Petition, p 7. This ridiculous contention could be taken seriously only if it is expected that lawyers around this Nation will admit in post-conviction hearings that they flatly refused to give their clients any advice as to whether a particular plea should be accepted or rejected.

The District Attorney, in other words, is making the frivolous contention that lawyers *en masse* will admit they failed to fulfill this most basic obligation, a duty the Second Circuit correctly observed "is so well understood by lawyers practicing in th[at] Circuit that the question has never been litigated", and which was enunciated by this Court almost a half century ago in *Von Moltke v Gillies,* 332 U.S. 708, 721 (1948)

STATEMENT OF THE CASE

A hearing on appellant's N.Y.S.C.P.L. 440.10 motion commenced on February 26, 1992, and concluded on March 6, 1992.[1] The following is a summary of the record as developed during that hearing.

On May 24, 1988, Orange County Indictment No. 88-246 was filed with the trial court charging respondent with the class A-II felony of criminal sale of a controlled substance in the second degree. Respondent was then represented by Thomas Murphy, Esq. of Newburgh, New York, who appeared with respondent at his arraignment when a plea of not guilty was entered.

Greenwald was retained by respondent on June 10, 1988. Two months later, on August 10, 1988, he appeared before the trial court without respondent[2] and rejected the People's plea offer of 1 to 3 years imprisonment, *the lowest sentence that could be offered by law*. The District Attorney then confirmed on the record that the People did "intend to seek a superseding

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[1]Greenwald's testimony alone spanned 270 pages of hearing transcript.

[2]Greenwald testified that respondent was in his office on the morning of August 10, 1988. Greenwald offered no explanation why he did not have respondent appear with him that afternoon to reject the plea offer.

indictment" and the next day, August 11, 1988, the District Attorney sent Greenwald notice of Grand Jury presentment.[3] On September 20th, the superseding indictment (No. 88-440) was handed up charging respondent with criminal sale of a controlled substance in the first degree, a class A-I felony. Respondent could never be offered the 1-3 plea again.

Greenwald testified a number of times during the post-conviction hearing that he never advised respondent as to whether he should accept or reject the People's 1-3 plea offer:

> Q Did you take a position in advising him whether to accept or reject a plea?
>
> A No, I did not.
>
> * * *
>
> Q I never advised Mr. Boria . . . that I can recall that he should accept the plea or reject the plea. Did you hear my response, Mr. McBride?[4]
>
> * * *
>
> Q And when did you first advise Mr. Boria with respect to accepting or rejecting the proffered plea?

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[3]It is not in dispute that on August 10, 1988, Greenwald not only knew that he was rejecting the best plea offer allowed by law, he also knew that as a result of that rejection his client would be indicted on an A-I felony making that plea offer forever unavailable as a matter of law.

[4]John S. McBride was the attorney conducting the examination.

A Mr. McBride, one, I never did, and so it's --

Q Thank you.

A So it's assumed I didn't.

Q If you never did, we don't have to go further.

A I said that before.

Greenwald never advised respondent "with respect to accepting or rejecting the proffered plea" despite the fact that the offer was the best authorized by law and, by rejecting such offer and allowing a superseding indictment to be handed up, that offer would be irrevocably withdrawn as a matter of law and respondent would face up to 25 years to life.

Respondent stressed in his testimony that had Greenwald advised him in August, 1988, that he was being offered a plea with a sentence of 1 to 3 years and that there was a real chance that he could be convicted, he would have accepted the offer. Respondent explained that he never received that advice. Respondent testified how Greenwald always conveyed to him, whenever he tried to discuss plea bargaining, that his case was "unique" and that he shouldn't worry about it as everything would be alright. Greenwald would also tell respondent that he, Greenwald, rarely lost a case.[5]

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[5]Respondent also testified how the only thing Greenwald ever wanted to speak with him about was money. He described in detail the way Greenwald repeatedly abused him in order to get paid more. During the trial itself, for example, Greenwald would take respondent out of the courthouse at lunch and tell him that he had to get him another one or two thousand dollars.

(continued...)

Greenwald's silence about whether to accept or reject the plea offer certainly gave respondent, who had no prior experience in the criminal justice system, reason to believe that plea bargaining was not something which was in his best interest.

Greenwald tried to answer respondent's claim that he was not properly advised by testifying that respondent was in his office repeatedly during the summer months of 1988 during which time they discussed the 1-3 offer and, according to Greenwald, respondent stated over and over that he was "absolutely innocent" and that no plea bargain would be acceptable to him.

This 1992 Greenwald version of these pre-August 10, 1988 conferences—that respondent was adamant about not pleading guilty—is belied by the completely different explanation Greenwald gave to the trial court on the eve of respondent's trial, when Greenwald was attempting desperately to get the plea offer back from the District Attorney. In his pretrial September 25, 1989 affirmation,[6] Greenwald swore to the trial court that it was

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[5](...continued)
Greenwald would repeatedly threaten, "If you don't have any more money for me, I'm going to drop you right now."

[6]Greenwald's 17 page September 25, 1989, affirmation was made in support of his motion seeking an order "granting a renewal of the Defendant's Motion to Dismiss pursuant to Section 210.40 of the Criminal Procedure Law, submitted April 21, 1989, and decided June 8, 1989, or in the alternative granting the Defendant's Motion made orally before this Court on September 20, 1989, dismissing the superseding Indictment and reinstating the original Indictment number 88-246, under which the Defendant was originally indicted." This motion was based upon what Greenwald claimed to be "newly discovered evidence which was not

(continued...)

because of the District Attorney's late notice of intent to use certain statements that respondent rejected the 1-3 plea offer:

> [I]t should be noted that initially the Defendant was indicted as [sic] a Grand Jury presentation for a Class A-2 Felony. During the plea negotiations the prosecutor's offer was to allow the Defendant to plead guilty to a B Felony, with a promise of a 1 to 3 year term of imprisonment, in satisfaction of the original Indictment. *Based on his knowledge of the prosecutor's case*, including the lack of statements attributed to the Defendant, as stated by the prosecutor, *the Defendant rejected the plea offer*.[7]

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[6](...continued)
available to the Defendant at the time the original motion was made. Specifically, the existence of the statements attributed to the Defendant, in the possession of the prosecutor". Greenwald stated that the prosecutor first made him aware of the statements during the course of a suppression hearing in August, 1989, and that on September 19, 1989, during jury selection, the prosecutor served formal notices of intent to use the statements pursuant to CPL Sec. 710.30

[7]In the next paragraph of the September 25, 1989, affirmation, in order to get the trial court to give respondent a second chance to consider the 1-3 plea offer, Greenwald swore:

> As noted, at the time of the plea bargain negotiations in question, neither the Defendant nor his attorney were aware of the existence of the alleged two (2) statements in question. Even more significantly, the prosecutor had, in fact, informed the Defendant and this Court, that no such statements existed. It is submitted, that had the attorney for the Defendant been aware of the existence of and the prosecutor's intent to use those statements for any purpose whatsoever, during the course of trial, then his advise [sic] to the Defen-

(continued...)

Greenwald's September 25, 1989 affirmation further requests the trial court to "afford the Defendant an opportunity to be *put back* in the same position he would have been . . . that is, in a position to plead guilty to [a] Class B Felony", which is to say, "the same position in which he would have been, relative to considering the offered plea bargain." Greenwald's language is unambiguous; its meaning is precise. In September, 1989, after it was too late, Greenwald was trying to get the 1-3 plea offer back. Nothing could more strongly indicate that respondent would have been receptive to a plea bargain in August, 1988 had he been properly counseled.[8]

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[7](...continued)

dant, relative to accepting or to rejecting the proffered offer of a plea to a B felony, may well have been different.

The Second Circuit found, as a matter of law, that Greenwald was not telling the truth when he swore to the trial court that the prosecutor denied the existence of the statements. Petitioner's App 11, n 6.

[8]During the post-conviction hearing, however, Greenwald denied the undeniable and swore that when he made these applications in September, 1989, he knew that respondent would never have accepted the 1-3 plea even if it had been offered to him again.

Greenwald testified that the language of his affirmation did not mean that he wanted respondent to have a second chance to take the 1-3. Rather it meant that he simply wanted respondent to go to trial on an A-II felony instead of an A-I. Thus, Greenwald's hearing testimony amounted to an admission that his September, 1989, oral and written applications were based upon an intentional misrepresentation to the trial court. If indeed Greenwald knew that respondent would not have pled guilty under any circumstances (his story at the hearing), then he was being dishonest when he stated, originally, that the reason for his motion to dismiss the superseding indictment (drastic relief to say the least) was to put respondent back "in a

(continued...)

But there are even more reasons for rejecting Greenwald's testimony—as adopted by the District Attorney—that because of respondent's purported adamance, Greenwald didn't have to give respondent any advice. First, Greenwald's file does not contain a single notation with respect to the 1-3 plea offer or his purported discussions about it with respondent prior to August 10, 1988. Second, Greenwald's file is devoid of even a shred of documentation to the effect that respondent was adamant about his innocence and that he would not consider a negotiated plea. Third, Greenwald had no recollection of having had any discussion with the District Attorney concerning a plea offer prior to August 10, 1988. Fourth, the District Attorney's file jacket is devoid of any notation that the 1-3 plea offer was ever conveyed to Greenwald prior to August 10, 1988.

Fifth, Greenwald testified that when Respondent first came into his office respondent informed him that he had learned about the offer from his prior counsel, Murphy. But Murphy testified that he could not recall ever learning of a plea offer from the District Attorney's office while he was representing respondent and that he therefore had no recollection of ever conveying any offer to respondent, let alone an offer of 1-3. Murphy explained that about 65% of his practice had been in the criminal law and that it had always been his procedure since he began practicing in 1979 to make a notation on his file of any plea offer which is made by the District Attorney. But when Murphy, in preparing for his testimony, reviewed the file he kept

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[8](...continued)
position to plead guilty to Class B Felony".

Whichever version is believed, the record demonstrates that Greenwald is not a credible witness, a fact that the Second Circuit adopted "as a matter of law". Petitioner's Appendix 11, n 6.

while representing respondent, he saw that there was no such notation of a plea offer contained anywhere in or on it.[9]

Obviously, there is no truth to the District Attorney's unsupported claim to this Court that "Greenwald was retained in this case only because [respondent] disagreed with the advice of his former attorney, who wanted [respondent] to plead guilty in exchange for the one-three year sentence." Petition, pp 10-11.

REASONS FOR DENYING THE WRIT

ARGUMENT

POINT I

Respondent was denied his Sixth Amendment right to effective assistance of counsel by Greenwald's failure to express an opinion as to whether the 1-3 plea offer should be accepted or rejected

In *Von Moltke v Gillies,* 332 U.S. 708, 721 (1948), the United States Supreme Court stated that "counsel *must*, after making an independent examination of the facts, circumstances, pleadings and laws involved, *offer his informed opinion as to what plea should be entered.*" (emphasis added). The record shows that

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[9]Significantly, Murphy testified that prior to his testimony in the post-conviction hearing he received two telephone calls from Greenwald in which Greenwald tried to refresh Murphy's recollection that he, Murphy, had in fact told respondent about the 1-3 offer. Murphy testified that he thereupon reviewed his file and confirmed that he indeed had no such recollection at all. Respondent confirmed in his testimony that Murphy never discussed any plea offer with him—they never got to that point.

Greenwald made no attempt to fulfill this duty to respondent. Indeed, Greenwald was emphatic about his never having "offer[ed] his informed opinion as to what plea should be entered." *Id.*

In *Walker v Caldwell,* 476 F.2d 213, 218 (5th Cir. 1973), the Court of Appeals for the Fifth Circuit made the following observation which applies with undeniable force to the instant appeal:

> The key words are "effective assistance of counsel." Much of the language of our recent cases in the area refers to whether the assistance was "effective". We must not ignore the equally important first requirement that appointed counsel actually and substantially *assist* his client in deciding whether to plead guilty.

Walker v Caldwell, 476 F.2d at 224 (emphasis in original).

In the States of Pennsylvania and Washington it has been held that, although the decision to plead guilty ultimately rests with the client, an attorney is obligated to assist in the decision making process and has the duty to give his client the benefit of his professional advice. *Commonwealth v Napper,* 385 A2d 521, 524 (S.C. Pa. 1978); *Washington v James,* 739 P.2d 1161. *See also, U.S. v Villar,* 416 F.Supp. 887 (S.D.N.Y 1976) (effective assistance of counsel "includes counsel's informed opinion as to what pleas should be entered.")

An attorney's duty to advise his client with respect to plea bargaining, *even when the client insists upon his innocence*, is set forth in I Amsterdam, Segal, and Miller, Trial Manual for the Defense of Criminal Cases (1967) and was noted by the Second Circuit below:

> The decision whether to plead guilty or contest a criminal charge is probably the most important single decision in any criminal case. This decision must finally be left to the client's wishes; counsel cannot plead a man guilty, or not guilty, against his will. But counsel may and must give the client the benefit of his professional advice on this crucial decision. (the word "must" was emphasized by the author; otherwise, the emphasis was the Second Circuit's)

As also noted by the Second Circuit, the Code of Professional Responsibility also supports a "duty to advise rule". Ethical Consideration 7-7, states that "[a] defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable . . ."

At the post-conviction hearing, Greenwald testified that he did not advise respondent on the crucial decision of whether or not to plead guilty because respondent insisted upon his innocence. The District Attorney now adopts this self-serving "excuse" of Greenwald, and argues that because respondent "adamantly professed his innocence" he could not have been prejudiced in the *Strickland* sense. The Second Circuit had little difficulty in dismissing this argument. The court below determined that Greenwald himself believed that the option of proceeding to trial was "suicidal". The Second Circuit also determined that Greenwald understood (and acknowledged) that it was "very possible" for clients to change their minds "for

whatever reason". Thus, the Second Circuit concluded that it was starkly prejudicial that Greenwald totally failed to offer respondent *any* advice in these circumstances.[10]

The problem with the District Attorney's prejudice argument is twofold. First, it fails logically because there cannot be a legitimate claim that respondent was "adamant" about not pleading guilty unless he refused to so plead in the face of advice to the contrary. Since Greenwald gave respondent no advice to accept the 1-3 plea offer, the District Attorney cannot argue that respondent was "adamant"—unyielding—about rejecting it.

Secondly, the District Attorney's lack-of-prejudice argument fails factually because, as noted above, even Greenwald acknowledged that he wasn't certain whether respondent—a man with no prior experience with the criminal justice system—would have changed his mind. Indeed, Greenwald's eleventh-hour manuevering to get the plea offer is a glaring indication that Greenwald believed that respondent would not have been deaf to advice to take the plea offer.

The District Attorney in essence is arguing that the Sixth Amendment requires nothing more from a criminal defense

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[10]The Sixth Circuit Court of Appeals in *Turner v Tennessee,* 858 F.2d 1201 (6th Cir. 1988), made it clear that the profession of innocence by a client does not excuse the failure to give that client advice as to whether to accept or reject a plea bargain. In the *Turner* case, the defendant insisted upon his innocence, both publicly and privately. Nevertheless, it was held that a defense attorney has a duty to analyze the evidence with his client, and to *confront* him with that evidence if necessary, to make sure that the defendant understands the import of his decision to reject the plea offer.

attorney than that he act as a plea messenger for the prosecution. The District Attorney is contending that this Court did not mean what it stated in *Von Moltke*, and that a defense attorney does *not* have a duty to "offer his informed opinion as to what plea should be entered." It is reprehensible for a District Attorney—a public official entrusted to protect the rights of the accused—to be making this argument.

Counsel's duty to advise his client in the course of criminal proceedings is *fundamental*. An attorney may not simply sit back and watch his client make a decision that he, the attorney, has ample reason to believe will destroy his client's life. If the lawyer is not there to counsel his client on whether to accept or reject a plea offer, it is difficult to justify his being there at all.

POINT 2

Trial Counsel's uncontroverted repeated admissions that he did not advise respondent as to whether to accept the proffered plea bargain under the circumstances of this case constituted a sufficient record upon which the Second Circuit based its decision

The District Attorney claims that the Second Circuit based its decision upon an "inadequate record". Petition, p 27. To support this claim, the District Attorney—again—intentionally misleads this Court by stating: "Clearly, the state court had never been asked to address the issue of whether Greenwald should have recommended acceptance of the People's plea offer." Petition, p 27.

The *first point* in Respondent's post-hearing memorandum to the state trial court, the *first point* in Respondent's brief to the state intermediate appellate court, and the *first point* in Respon-

dent's application for leave to appeal to the New York Court of Appeals was the *very issue* upon which the Second Circuit has granted relief. (The pertinent pages of these documents are annexed hereto as Appendix 3) Contrary to the District Attorney's false representation to this Court on p 5 of its Petition (as well as on p 27), the state trial court and the state appellate courts were clearly and completely "focused" on this issue. As can be seen in Appendix 3, the state trial and appellate courts were provided with the authority that was relied upon by the Second Circuit in the decision below. Sadly, there is no other way to say it: the District Attorney has decided to mislead this Court in his effort to put respondent back in prison.

There is no need whatever for "clarification", as the District Attorney disingenously puts it on p 28 of the Petition. As the Second Circuit found—without possible dispute:

> Greenwald testified at great length at the hearing . . . time and again, and in many forms, Greenwald made clear that he had not in any way or at any time discussed with the [respondent] the advisability of accepting or rejecting the plea offer . . . His testimony made clear that, although he never even suggested such a thought to [respondent], it was his own view that his client's decision to reject the plea bargain was suicidal.

Petitioner's App 4 and 5.

The state and federal courts below had these facts, together with respondent's various briefs presenting this issue as the *primary* argument. The record below was obviously adequate, and the District Attorney's argument is devoid of merit.

POINT 3

The District Attorney waived its *Teague v Lane* argument by failing to present it to the District Court or to the Second Circuit until a motion for reargument

Again, the very issue upon which the Second Circuit decided this case was presented by respondent as the *primary* issue to every court, state and federal, that heard this case.

The District Attorney never argued—until his motion for reargument to the Second Circuit—that the rule briefed by Respondent to each and every state court and the District Court and the Second Circuit was in fact a "new rule" within the meaning of *Teague v Lane*, 489 U.S. 288 (1989) This argument, therefore, is waived. *Collins v Youngblood*, 497 U.S. 37, 41 (1990) (*Teague* defense not jurisdictional; State waives it by failing to plead it)

POINT 4

The Second Circuit did not announce a new rule within the meaning of *Teague v Lane*

Even assuming that this argument is not waived, it is not substantively meritorious.

The Second Circuit observed that *Strickland v Washington*, 466 U.S. 668 (1984) indicated that American Bar Association standards are guidelines to be utilized in determining what constitutes ineffective assistance of counsel. Petition App 8. The court below further observed that ABA Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992) states:

> A defense lawyer in a criminal case has the duty to advise his client fully on *whether a particular plea to a charge appears to be desirable.*

Petition App 8. The Second Circuit cogently noted that this duty is so well understood by criminal defense attorneys that the issue is one that did not need litigation to be clarified. Petition App 8.

The District Attorney now argues that this duty of a criminal defense attorney has never been established by the Supreme Court and that the language to the contrary in *Von Moltke v Gillies,* 332 U.S.708, 721 was only *dicta.* In *Von Moltke,* a *habeas* petitioner asserted that her entry of a plea of guilty was invalid because she had not been afforded the assistance of counsel. This Court squarely held:

> Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.

Von Moltke, 332 U.S. at 721. This is precisely what Greenwald did *not* do at bar, and this is precisely why the state court judgment at bar is contrary to and an unreasonable application of the decision in *Von Moltke.* It bears noting that Respondent argued to the state trial and appellate courts that *Von Moltke* controlled the outcome of this case. The state courts, then, simply refused to apply the above holding of *Von Moltke.*

Moreover, this Court has not diluted the duty established in *Von Moltke* in any way since that decision, and has quite obviously often assumed its existence. *Cf. Holloway v Arkansas,* 435 U.S. 475 (1978); *Burger v Kemp,* 483 US 776, 785-787

(1987) In *Hill v Lockhart,* 474 U.S. 52, 56 (1985), this Court held that the voluntariness of a plea "depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " (*quoting McMann v Richardson,* 397 U.S. 759, 771 (1970)) This Court further stated, "Our concern in McMann v Richardson with the quality of counsel's performance in advising a defendant whether to plead guilty stemmed from the more general principle that all 'defendants facing felony charges are entitled to the effective assistance of competent counsel.' " *Hill,* 474 U.S. at 57, *quoting McMann,* 397 U.S. at 771 and n 14.

This Court's *Teague* jurisprudence makes clear that Greenwald's ineffectiveness at bar is subsumed by *Von Moltke* and later cases. *See, e.g., Wright v West,* 120 L.Ed.2d 225, 249-250 (1992) (Kennedy concurring) ("Where the beginning point is a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one *not dictated by precedent.*") (emphasis added); *Wright,* 120 L.Ed.2d at 253 (Souter, concurring) (the new rule doctrine "does not mean, of course, that a habeas petitioner must be able to point to an old case decided on facts identical to the facts of his own. But it does mean that, in light of authority extant when his conviction became final, its unlawfulness must be apparent."); *Wright,* 120 L.Ed.2d at 247 (O'Connor, concurring) ("If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with

which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable.")[11]

Contrary to the District Attorney's present argument (which miscasts the Second Circuit's holding as creating new obligations on the part of criminal defense attorneys), the decision below clearly did not announce some sort of new rule never before enunciated by the Supreme Court. The above cases make clear that the Supreme Court (and lower federal and state courts) has (have) always demanded that accused felons be given informed advice as to whether a guilty plea should be entered. The fact that Greenwald managed to violate this cardinal principle in an unusually brazen manner—he admitted (indeed, *insisted*) that he gave no advice at all—does not render *habeas* relief thereon a "new rule" in any sense of that term.

POINT 5

The "Antiterrorism and Effective Death Penalty Act of 1996" does not apply retroactively to habeas corpus petitions not involving death sentences filed prior to the statute's enactment

Respondent filed this petition for a writ of *habeas corpus* in the District Court on March 16, 1995. The District Court issued its decision denying the writ on October 6, 1995. Respondent appealed that decision to the Second Circuit, and the decision of the court below was issued on May 3, 1996.

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[11]The lower federal and state court cases presented in this Brief further underscore the point that the Second Circuit's holding is not a new rule.

On April 24, 1996, President Clinton signed into law the "Antiterrorism and Effective Death Penalty Act of 1996", P.L. 104-132. The Act is divided into 9 titles, but only Title I is of relevance here.

Title I is entitled "Habeas Corpus Reform" and consists of 8 sections. Sections 101, 102 and 103 are not relevant here.

Section 104 of the Act bars the federal courts from granting *habeas* relief from a claim unless the adjudication of the claim in the state courts:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 105 is not relevant herein, and Section 106, which applies to second or successive *habeas* applications, is not relevant here. Section 107 involves death penalty litigation procedures and is not directly relevant here. Section 108 involves amendments to federal narcotics laws and is not relevant here.

The District Attorney is contending that this Act should be applied retroactively to respondent's *habeas* petition. The Second Circuit correctly held that the Act should not be applied retroactively to this case.

This Court has recently held that "retroactivity is not favored in the law". *Landgraf v USI Film Products,* 114 S.Ct. 1483,

1496 (1994) This Court held that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine older than our republic." *Landgraf,* 114 S.Ct. at 1497.

Landgraf mandates that the first step in any retroactivity analysis is to determine whether Congress has prescribed a statute's proper reach. 114 S.Ct. at 1505.

In adopting the Act in question here, Congress clearly considered the question of its application to cases filed prior to the Act's effective date. Consistent with its overall scheme, Congress provided very different answers to the retroactivity question in the general provisions in Sections 101-106 than in the more restrictive provisions that apply pursuant to Section 107 as a *quid pro quo* to states providing capital prisoners with adequate funding for competent state post-conviction counsel and certain other procedural advantages.

Of particular significance is the provision setting forth the effective date of the Section 107 procedures. It states that the special *habeas corpus* procedures in capital cases "shall apply to cases pending on or after the date of enactment of this Act." There is, however, *no similar provision* regarding the effective date of the *habeas corpus* changes in Sections 101-106—the sections that control the case at bar. The express inclusion of the effective date language in Section 107, and the omission of comparable language for the other amendments, evidences a clear congressional intent that only the more restrictive procedures in Section 107 were to apply to pending cases, as a *quid pro quo* for various procedural advantages previously afforded petitioners subject thereto. By contrast, Congress did not intend for the new procedures in Sections 101-106 to apply to cases in which the federal courts' jurisdiction has been invoked prior to

the effective date of the Act by petitioners who were not previously given those procedural advantages. *See Russello v United States,* 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute, but omits it in another section of same Act, it is generally assumed that Congress acts intentionally in the disparate inclusion or exclusion").

The Second Circuit correctly held that due to the clear expression of congressional intent arising from the structure and language of Title I, this case must be adjudicated pursuant to the law in effect at the time Respondent invoked the jurisdiction of the District Court.[12]

POINT 6

The District Attorney has waived the argument that the new Act applies to this case

Even assuming that this Court determines that the Act applies retroactively to cases already decided by a district court, it is respectfully contended that it should not be applied at bar. The relevant provisions of the Act somewhat codify *Teague v Lane*, 489 U.S. 288 (1989) (The Act requires more procedural deference to state court judgments than did the *Teague* doctrine because analysis is confined to clearly established federal law *as determined by the Supreme Court*—presumably this is based upon the view that state courts are only bound by Supreme Court precedent and that therefore state court judgments could not be overturned by *habeas* courts applying federal law as established by district or circuit courts). But, as argued previ-

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[12]*Accord, see Edens v Hannigan,* 87 F.3d 1109 (CA10 1996); *but see, Lindh v Murphy,* 96 F.3d 856 (CA7 1996)

ously in this Brief, the District Attorney did not raise a *Teague* argument before state courts, before the District Court or even before the Second Circuit (until his motion for reargument).

The Act was enacted prior to the decision of the Second Circuit. Certainly a petition for rehearing to a circuit court of appeals is not the appropriate time in a *habeas* case to first raise a "new rule" issue or to raise an issue based upon a statute enacted *prior* to the panel decision of the circuit court.

Section 104 of the Act is similar in structure and application to pre-existing limitations on *habeas corpus* adjudication such as exhaustion, procedural default, harmless error, successive petitions, and the new rule doctrine of *Teague v Lane*. None of these limitations are jurisdictional, and all give the State the burden of invoking the limitation and proving its applicability to a particular case. *See, e.g., O'Neal v McAninch,* 115 S.Ct. 992, 994 (1995) (harmless error); *McClesky v Zant,* 111 S.Ct. 1454, 1470 (1991) (abuse of writ); *Collins v Youngblood,* 497 U.S. 37, 41 (1990) (*Teague* defense *not jurisdictional*; State waives it by failing to plead it); *Granberry v Greer,* 481 U.S. 129, 132 (1986) (nonexhaustion doctrine); *Estelle v Smith,* 451 U.S. 454, 468 n 12 (1981) (State waived procedural default defense by failing to invoke it)

The fact that the Act's restrictions are statutory—as opposed to judicially crafted—is of no moment. For example, the exhaustion of state remedies is statutorily mandated. *See* 28 USCS 2254 (b). "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *shall not be granted* unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process

ineffective to protect the rights of the prisoner.") (emphasis added). Yet, *Granberry v Greer* makes clear that exhaustion of state remedies is waivable.

Nothing in the new Act expresses any intent to limit jurisdiction of the federal courts. Therefore, Section 104 should come into play only if it is timely invoked by the State. *See Collins, supra*; *Goeke v Branch,* 131 L.Ed.2d 152 (1995)

POINT 7

The Second Circuit's decision was based upon clearly established law as determined by the Supreme Court that the Sixth Amendment requires counsel's informed opinion as to whether a plea bargain should be accepted or rejected is not a new rule within the meaning of *Teague v Lane*

Even assuming this Court determines that the Act is retroactive to this case and that the argument has not been waived, Petitioner contends that the panel decision was based upon clearly established precedent as determined by this Court. This argument has been already been made in this Brief in the context of *Teague v Lane*. But because the new Act somewhat changes the analysis,[13] this further comment is necessary: the arguments made in Point 4 of this Brief apply herein, *minus* any argument based upon decisions of lower federal and state courts.

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[13]Again, the Act requires more procedural deference to state court judgments than did the *Teague* doctrine because analysis is confined to clearly established federal law *as determined by the Supreme Court*—presumably this is based upon the view that state courts are only bound by Supreme Court precedent and that therefore state court judgments could not be overturned by *habeas* courts applying federal law as established by district or circuit courts.

Put into the context of the new Act, Respondent contends that the state court judgment herein was an unreasonable application of Supreme Court precedent for the reasons articulated in Point 4 of this Brief.

It should be noted that Senator Orrin Hatch, who drafted the subject Section 104 provisions, stated during the congressional debates on the Act:

> Moreover, the review standard proposed allows the Federal courts to review State court decisions that *improperly apply* clearly established Federal law. In other words, if the State court *unreasonably applied* Federal laws, its determination is subject to review by the Federal courts.

142 Cong. Rec. S3446 (April 17, 1996) (emphasis added)

This Court's *Teague* jurisprudence (which certainly will be relevant in analyzing the consequences of Section 104 of the Act) makes clear that Greenwald's ineffectiveness at bar is subsumed by *Von Moltke* and later cases.[14]

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[14]Again, *see* authorities cited on p 19 of this Brief.

CONCLUSION

This Court should deny certiorari.

Dated: Middletown, New York
November 13, 1996

Respectfully submitted by:

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APPENDIX 1—Errata of the Second Circuit duly filed May 21 and July 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1332—August Term, 1995
(Argued March 29, 1996 Decided May 3, 1996)
Docket No. 95-2688

OSCAR BORIA,

Petitioner-Appellant,

-v-

JOHN KEANE, Superintendent,
Sing Sing Correctional Facility,

Respondent-Appellee.

ERRATA

Page	Line	Delete	Insert
3664	21-22	discusses the question in more detail	observed
3664	31-38	:and often counsel can protect the client from disaster only by using a	....

considerable amount of
persuasion to convince
the client that a plea
which the client instinctively
disfavors is, in
fact, in his or her best
interest. This persuasion
is most often needed to
convince the client that
s/he should plead guilty
in a case in which a not
guilty plea would be
destructive

Distribution:

x Panel Members
x West Publishing Co.
x Clerk

So Ordered:

s/illegible
U.S. Circuit Judge

illegible
Date

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1332—August Term, 1995

Petition for Rehearing
Submitted: May 17, 1996

Decided July 17, 1996

Docket No. 95-2688

OSCAR BORIA,

Petitioner-Appellant,

-v-

JOHN KEANE, Superintendent, Sing Sing Correctional Facility,

Respondent-Appellee.

Before:

OAKES and PARKER, Circuit Judges,
and KNAPP, District Judge.*

---

* Honorable Whitman Knapp of the United States District Court for the Southern District of New York, sitting by designation.

ERRATA

Page	Line	Delete	Insert
3670(b)	3 thru 5	does not apply retroactively to habeas corpus petitions not involving death sentences filed prior to the statute's enactment.	does not apply to this case.

Distribution:

xx Panel Members
xx West Publishing Co.
xx Clerk

So Ordered:
s/illegible
U.S. Circuit Judge

7/31/96
Date

ERRATA ON OPINIONS 1995 TERM

Page 3373. line 29—delete "time barred" and insert "time-barred" in place thereof.

Page 3418. line 19—delete "This motion" and insert "This cross-motion" in place thereof.

Page 3418. lines 23-24—delete "not previously to have arisen." and insert "not to have previously arisen." in place thereof.

Page 3419. line 4—delete "deny the motion" and insert "deny the cross-motion" in place thereof.

Page 3422. line 24—delete "Axel Johnson," and insert "*Axel Johnson*," in place thereof.

Page 3426. line 24—delete "exempt any such" and insert "exempt those" in place thereof.

Page 3426. Fn. 3, line 5—delete "(7th Cir. 1990" and insert "(7th Cir. 1990)" in place thereof.

Page 3426. Fn. 3, line 7—delete "(9th Cir. 1991)" and insert "(11th Cir. 1991)" in place thereof.

Page 3426. Fn. 3, line 9—delete "judgment)." and insert "judgment), *cert. denied*. 502 U.S. 1049 (1992)," in place thereof.

Page 3476. line 5—delete "Garden City, NY *for*" and insert "Garden City, NY, *for*" in place thereof.

Page 3476. line 9—delete "brief) *for*" and" and insert "brief, *for*" in place thereof.

Page 3494. line 6—delete "a new" and insert "her" in place thereof.

Page 3494. line 7—delete "in the district court".

Page 3500. line 29—delete comma after "better".

Page 3503. line 6—delete comma after "Chicago".

Page 3505. line 1—delete "hich" and insert "which" in place thereof.

Page 3505. line 7—insert comma after "Brawer".

Page 3529. line 18—delete "LUMBARD, and" and insert "LUMBARD and" in place thereof.

Page 3530. line 16—delete "civil cases and" and insert "civil cases, and" in place thereof.

Page 3531. line 29—insert "other suit" after "other, unrelated suit" in place thereof.

Page 3534. line 8—insert "a broad discretion," after "broad discretion."

Page 3659. Fn. 1 ln 1—delete "As any trier of fact would have a tendency to discount (or even reject) the testimony of a defendant," and insert "As the state court finders of fact may have rejected parts or even all of petitioner's testimony." in place thereof.

Page 3660. lines 29-30—insert "[see footnote 3]".

Page 3665. line 2—delete "supplied by us" and insert "ours" in place thereof.

Page 3666. Fn 6, ln 6—delete "4" and insert "3660" in place thereof.

Page 3669. line 10—delete "questions" and insert "conclusions" in place thereof.

APPENDIX 2—Corrected Opinion of the Second Circuit in Boria v. Keane dated October 25, 1996

CORRECTED OPINION
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1332 August Term, 1995
(Argued March 29, 1996 Decided May 3, 1996
Corrected by Errata duly filed May 21, and July 11, 1996 Refiled and reissued to incorporate said corrections, October 25, 1996 †)

Docket No. 95-2688

OSCAR BORIA,

Petitioner-Appellant,

v.

JOHN KEANE, Superintendent, Sing Sing Correctional Facility,

Respondent-Appellee

Before: OAKES and PARKER, Circuit Judges,
and KNAPP, Senior District Judge*

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*Honorable Whitman Knapp of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from order entered in the United States District Court for the Southern District of New York (Conner, J.) denying a petition for a writ of habeas corpus.

Vacated and remanded.

Robert N. Isseks, Middletown, NY for petitioner-appellant

Francis D. Phillips, II, Goshen, NY for respondent-appellee.

+This Corrected Opinion is issued solely for the purpose of incorporating into the text the errata duly filed May 21, and July 11, 1996.

WHITMAN KNAPP, Senior District Judge

The petitioner is now—and for about six years has been—serving a twenty year to life sentence resulting from a "buy and bust" arrest for having sold four plastic bags of cocaine to an informer. This was petitioner's first contact with the criminal law. Upon this appeal, he does not challenge the propriety of the trial leading to his conviction. Rather, he asserts that he was deprived of constitutionally adequate representation by counsel when the People offered him a plea bargain which would have resulted in a one to three year sentence, and his attorney allowed him to reject such offer without giving him any advice as to the wisdom of so doing.

This argument was first presented to and rejected by the judge who had presided over the trial. The trial judge's rejection was affirmed by the Appellate Division of the New York Supreme Court, and leave to appeal to the Court of Appeals was denied. Petitioner renewed the claim in the instant Habeas Corpus proceeding, where it was rejected by the District Court in a carefully considered opinion. This appeal followed.

BACKGROUND[1]

Petitioner was arrested on May 13, 1988, and eleven days later was indicted for a Class A-II felony. Upon arraignment, being represented by one Thomas Murphy, Esq., he pleaded not guilty. On June 10, petitioner's father retained Gary Greenwald, Esq. to represent his son, making an "up front" payment of $8,000.[2] Some time between July 25 and August 10, the District Attorney advised Greenwald that the People were willing to accept a plea of guilty under circumstances which would result in a sentence of 1 to 3 years; but warned that should such offer be rejected, there would be filed a superseding indictment for a Class A-I felony which, pursuant to the "Rockefeller Laws," would make that or any similar plea impossible.

On August 10, Greenwald advised the court that the petitioner rejected the offer. The District Attorney then put on the record the warning he had previously given Greenwald about the consequences of rejection; and on the following day sent Greenwald a formal notice that the matter was to be presented to a Grand Jury. The threatened indictment was not returned until September 20, 1988. Petitioner was ultimately convicted, and on January 4, 1990, began to serve his sentence.

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[1]As the state court finders of fact may have rejected parts or even all of petitioner's testimony, this statement will be based exclusively on matters of record and the testimony of the attorney claimed to have rendered constitutionally ineffective representation.

[2]The formal retainer agreement executed by petitioner on or about June 10 provided: "I ... do hereby agree to retain the law office of Greenwald, Graubard & Cohen on the matter pending before Goshen County Court. The legal fees exclusive of hearings and trials shall be a minimum of $10,000 and a maximum of $20,000. The retainer does not apply to any form of appeals." (H. 36-37).

In 1992, petitioner, represented by a different attorney, moved the trial judge for an order vacating the judgment of conviction on the ground, among others, of constitutionally inadequate representation by counsel. A hearing on such motion, among others, began on February 26 and concluded on March 6.

Greenwald testified at great length at the hearing. He testified that he did not recall any conservation with the District Attorney or anyone in the District Attorney's office regarding the case before August 10. Nothing in his testimony suggests that he had any contact with the District Attorney's office between August 10 and September 20. Indeed, he testified that he could not recall with certainty the name of any assistant district attorney with whom he might at any time have spoken regarding this case. He had at all times exclusively relied on the petitioner for any and all information about the case.

Just before the trial began, Greenwald sought a ruling suppressing two ruinous statements petitioner had made after his arrest. He told the trial judge:

> had the attorney for the Defendant been aware of the existence of and the prosecutor's intent to use those statements for any purpose whatsoever, during the course of trial then his advise to the Defendant, relative to accepting or to rejecting the proffered offer of a plea to a B felony, may well have been different.

Greenwald Affirmation, 9/25/89.[3]

However, time and again, and in many forms, Greenwald made clear that he had not in any way or at any time discussed with the petitioner the advisability of accepting or rejecting the offered plea. He testified that, after advising petitioner that a rejection of the plea would be final in the sense that the expected superseding indictment would eliminate all possibility of a minimal sentence, he kept discussing with petitioner strategies he planned to follow in defending against the new indictment.

His testimony made clear that, although he never even suggested such a thought to petitioner, it was his own view that his client's decision to reject the plea bargain was suicidal.[4] He

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[3]New York Criminal Procedure Law provides that upon demand of a defendant, the prosecutor has a duty to disclose "any written, recorded or oral statement of the defendant . . . made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him." N.Y. Crim. Proc. Law §240.20(1) (a) (McKinney 1993). Greenwald swore in his affidavit of September 25, 1989, offered in support of his motion to suppress the statements, that "the prosecutor had . . . [falsely] informed the Defendant and this Court, that no such statements existed."

[4]For example, at the hearing, Greenwald testified: "on June 10th, 1988 [the day Greenwald was retained], it would have been my position and my belief that relative to criminal cases that a drug case under circumstances of a possession or direct sale to an undercover agent is probably one of the most difficult cases to defend and, secondly, sir, in relationship to the hate, which I often tell drug defendants, that most people who sit on the jury have never seen drugs before such as cocaine . . . and [the jurors] generally are very prejudicial because peoples' views are very anti-drugs and, therefore, it is difficult and it's often difficult to get an unbiased jury in that regard." H. at

(continued...)

sought to justify his conduct by asserting that he was certain that the petitioner would never admit his guilt or accept a plea. He said he had been confirmed in this certainty by the petitioner's repeated assertion that accepting a plea would embarrass him in front of his children. For example, Greenwald testified: "He would be very upset about the plea. He was upset about how he was embarrassed in front of his children. And he would bring up the subject in a context often about his upset about his children." (H. at 18).

Greenwald admitted that he had been aware that his client—like any other person—was capable of changing his mind.[5] Yet he did nothing to persuade either his client or the father by whom he had been retained of the absurdity of a decision to risk years of prison separation from his family to avoid a few hours of embarrassment "in front of his children."

DISCUSSION

Several questions are presented by the foregoing facts:

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[4](...continued)
44 (emphasis supplied). He also testified that he had told the judge at sentencing that the court could "take judicial notice" that getting an acquittal in a drug case in upstate New York was almost impossible. Id.

[5]Greenwald's testimony in this regard was:
Q (by petitioner's counsel) Mr. Greenwald, you knew from Day One, as you tell us, that he wasn't going to plead to anything; correct?
A To answer your question, sir, what I knew from the beginning and having practiced criminal law for substantial years, often a client changes his position in regard to a matter, and though he did express what I have said, it is very possible at any given time he would change his mind for whatever reason. So the answer to your question is I did not know definitely.

1. Under Strickland v. Washington 466 U.S. 668, 104 S.Ct. 2052, 90 L.Ed.2d 674 (1984) (hereinafter "Strickland"), do the facts establish that Greenwald's conduct did indeed fall short of constitutionally required assistance?

2. Also under Strickland, can it be said that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"?

3. What is the impact upon this case of Strickland's "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance?"

4. Are we precluded from considering these questions by any factual finding that may have been made by a New York State court?

We shall consider each of these questions in turn.

First, to show Strickland ineffectiveness it must appear that, under the totality of circumstances, Greenwald failed to exercise the skills and diligence that a reasonably competent attorney would provide under similar circumstances. 466 U.S. at 688. There seems to be no Second Circuit decision dealing with the precise question of a criminal defense lawyer's duty when a defendant's best interests clearly require that a proffered plea bargain be accepted, but the defendant, professing innocence, refuses to consider the matter. This lack of specific decision undoubtedly arises from the circumstance that such duty is so well understood by lawyers practicing in this Circuit that the question has never been litigated.

While the Second Circuit may not have spoken, the Strickland Court has indicated how the question should be resolved. Just before starting its discussion of the merits, it observed that it had "granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." 466 U.S. at 684. Later it pointed to "[p]revailing norms of practice as reflected in American Bar

Association standards" as guides "to determining what is reasonable." Id. at 688.

The American Bar Association's standard on the precise question before us is simply stated in its Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992):

> A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable. (emphasis added)

Anthony G. Amsterdam, in Trial Manual 5 for the Defense of Criminal Cases (1988), observed:

> The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, or not guilty, against the client's will. [citation omitted] But counsel may and must give the client the benefit of counsel's professional advice on this crucial decision. § 201 at 339 (the word "must" was emphasized by the author; otherwise, the emphasis is ours)

This manual is a joint project of the American College of Trial Lawyers, the National Defender Project of the National Legal Aid and Defender Association, and the ALI-ABA Committee on Continuing Professional Education. The Reporter, Anthony G. Amsterdam, is a distinguished Professor of Law and Director of Clinical Programs and Trial Advocacy at New York University School of Law.

And finally, in United States v. Villar 416 F.Supp. 887, 889 (S.D.N.Y. 1976), Judge Motley—in circumstances quite

different from those at bar—made the following observation about effective assistance of counsel:

> Effective assistance of counsel includes counsel's informed opinion as to what pleas should be entered. Walker v. Caldwell, 476 F.2d 213, 224 (5th Cir., 1973); Jones v. Cunningham, 313 F.2d 347 (4th Cir. 1963), cert denied 375 U.S. 882, 84 S. Ct. 42, 11 L.Ed.2d 63 (1965). As Chief Judge Sobeloff stated in the latter case (at 353):
>
> > Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist. Such a duty is imposed for the salutary reason that 'prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.' Van Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948). (emphasis Judge Motley's)

Turning to the facts before us, it would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice.

The second Strickland question need not long detain us. Had Greenwald—as he "often [told] drug defendants"—advised his two new clients (petitioner's father, who procured and paid him and petitioner, who signed the retainer agreement) of his professional judgment that it was almost impossible for a "buy and bust" defendant to obtain an acquittal in Orange County (see footnote 4, supra), there would have been more than a "reasonable probability" that the father would have organized the family to persuade petitioner not to pursue the suicidal course he

seemed bent upon following. Indeed, had Greenwald taken the trouble to learn of the ruinous statements petitioner had made after his arrest,[6] the probability of persuading him to accept the plea bargain would have matured from a "reasonable probability" to a very strong likelihood.

With respect to the Strickland "strong presumption," the District Judge in explaining his order under appeal gave it serious consideration. He emphasized Greenwald's testimony that he "had frequently discussed the plea offer with [petitioner] during the summer of 1988." This emphasis suggests that the District Judge considered the "strong presumption" as requiring a finding that Greenwald—in the course of these frequent discussions—must have, by implication at least, conveyed to his client his own belief that rejecting the offered plea bargain would be suicidal. However, Greenwald's unequivocal testimony prohibits such a finding. Such testimony did not give much indication of what occurred during these frequent discussions except that Greenwald seems to have kept explaining his planned strategies for winning an acquittal. However, it established beyond peradventure that Greenwald never gave his client any advice or suggestion as to how to deal with the People's offered plea bargain.

More importantly, the Strickland Court did not intend its "strong presumption" to apply to a case such as this. It made clear that the purpose of the presumption was to protect lawyers from having strategic decisions judged with "the distorting

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[6] As noted in footnote 3, supra, Greenwald's affidavit in support of his motion to suppress these statements asserts that he had made appropriate demand on the District Attorney but that the latter had deceitfully denied the existence of any such statements. We find—especially in light of Greenwald's testimony about his contacts with the District Attorney's office (see [p. 4] supra)—that such assertion is sufficiently improbable to warrant rejection as a matter of law. We do so reject it.

effects of hindsight." 466 U.S. at 689.[7] Greenwald was confronted with no strategic decision as to whether or not to give advice to his client. Had there been a reasonable chance of acquittal, petitioner might have been confronted with the strategic decision of whether or not to accept the plea bargain. In no event could Greenwald have been relieved of his constitutional duty to give his "professional advice on this crucial decision."

The fourth question, whether relief is precluded by any state court finding of fact, requires consideration of several circumstances heretofore irrelevant to this opinion.

No state court ever gave solo consideration to the narrow question addressed in this opinion. On the contrary, the above noted hearing before the trial court, which began on February 26 and concluded on March 6, dealt with an "omnibus" motion presenting an apparently wide variety of claims. Petitioner himself testified, claiming—in a manner typical of distraught defendants—all manner of real and imagined grievances. Among other things, he claimed that he had not been informed of the offered plea bargain until after the superseding indictment had been returned. That claim could be—and was—easily refuted by testimony of several witnesses whose credibility could not be questioned. The District Attorney, apparently treating the omnibus motion as a unit, made an attack on petitioner's credibility, focusing on this particular falsehood. The question of petitioner's reliability might well have been vital to many—if not most—of the questions presented by the

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[7] The Strickland Court was dealing with a capital case in which it was contended that the defendant's lawyer should have—in the sentencing phase of the case—provided the trial judge with concededly helpful character-type evidence. The lawyer's strategic reason for withholding such evidence was fear that—in light of expected cross-examination and rebuttal—it would do more harm than good.

omnibus motion. However, it has no bearing on the narrow question with which we are now concerned. See Footnote 1, supra.

When it came to decision, the trial judge was primarily concerned with a question of no present relevance, namely whether petitioner's statement as to the timing of his knowledge of the possibility of a plea bargain was truthful or false. His opinion does not mention petitioner's constitutional right to be advised whether or not the offered bargain "appear[ed] to be desirable." Similarly, the Appellate Division's affirming opinion addressed a host of issues not here relevant. Its sole finding of fact concerning the claimed inadequacy of counsel was that "[the petitioner] was made aware of a plea offer of 1 to 3 years imprisonment, and told his trial counsel to reject it." People v. Boria 612 N.Y.S.2d 80, 81, 204 A.D.2d 652 (2d. Dept. 1994).[8]

Turning to the question of whether we are precluded, we are faced with an Appellate Division finding of fact which has no present relevance, coupled with a conclusion of law that petitioner had been adequately represented by counsel. The District Attorney notes in his brief, at p. 8 citing Strickland, 466 U.S. at 698 and Winkler v. Keane 7 F.3d 304, 308 (2d. Cir. 1993), cert, denied, 114 S.Ct. 1407 (1994), that conclusions of law require de novo review. As we have seen, such review can lead to only one conclusion.

This leaves the question of what remedy should result from our ruling. In denying petitioner's motion to vacate the judgment, the trial judge suggested that the remedy petitioner sought, namely to be put back in a position of being able to plead to the

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[8] Leave to appeal to the Court of Appeals was denied by Honorable George Bundy Smith. 83 N.Y.2d 1002, 640 N.E.2d 151, 616 N.Y.S.2d 483 (1994). The Court itself was in no way involved, leaving the Appellate Division as the highest New York court to have ruled on the matter before us. See N.Y. Crim. Proc. Law §460.20 (McKinney 1994).

lesser indictment, was procedurally impossible. Whether or not such relief would then have been possible, it would not now be appropriate. There could now be no assurance that witnesses necessary for prosecution would be available should a trial be required. Furthermore, there is no claim before us on this appeal that the trial was affected by constitutional (or indeed any) error. Accordingly, petitioner having already served six years in prison —at least twice as long as would have been possible had he accepted the offered plea bargain—we shall order that the sentence be reduced to time served and that the petitioner be discharged, but the judgment of conviction will not be disturbed.

CONCLUSION

For the above stated reasons, we vacate the order appealed from, and remand to the District Court for entry of an order granting the petition and directing that the petitioner be discharged.

APPENDIX 3—Portions of respondent's post-hearing memorandum (cover page, table of contents and pages 37-41)

COUNTY COURT : STATE OF NEW YORK
COUNTY OF ORANGE

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

INDICTMENT NO. 88-440

OSCAR BORIA,

Defendant.

----------x

POST-HEARING MEMORANDUM

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COUNTY COURT : STATE OF NEW YORK
COUNTY OF ORANGE

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

INDICTMENT NO. 88-440

OSCAR BORIA,

Defendant.

----------x

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(37) to us immediately so that we may see if this satisfies our lien in this matter."

(6) That the Gurda office never received any response to their November 2, 1989, letter to Greenwald. Greenwald ignored Gurda's request completely. Greenwald never advised Gurda of the settlement amount, never advised Gurda how the proceeds were disbursed, never advised Gurda how he, Greenwald, decided that he deserved twice the legal fee that the Gurda firm deserved, and never provided Gurda with an accounting.

Boria's counsel made this offer of proof not only to show this Court that Greenwald lacks integrity and that he is dishonest, but also to show how Greenwald conducts himself as though the Code of Professional Responsibility does not apply to him vis a vis his dealings with other lawyers and that there is therefore no reason to believe that he cares about the Code of Professional Responsibility in his dealings with his clients, and particularly Boria. This Court refused to accept this offer of proof.

ARGUMENT

POINT I

BORIA WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL BY GREENWALD'S FAILURE TO ACTUALLY AND SUBSTANTIALLY ASSIST BORIA IN DECIDING WHETHER TO ACCEPT THE 1-3 PLEA OFFER

Greenwald repeatedly insisted during his testimony that he gave Boria absolutely no advice with respect to the 1-3 plea offer. Greenwald and Neylon did testify, however, that Greenwald (38) expressed to Boria the opinion that the search and seizure was unlawful and that, although he could not predict the outcome with certainty, he, Greenwald, felt that Boria's chances at suppression were "excellent". If this testimony is to be

believed, the Court must find that Greenwald failed to provide Boria with the meaningful and objectively reasonable representation mandated by the state and federal constitutions.

Although the decision to plead guilty ultimately rests with the client, an attorney is obligated to assist in the decision making process. Trial counsel for an accused has the duty to give his client the benefit of his professional advice. Commonwealth v Napper, 385 A2d 521, 524 (S.C. Pa. 1978); Washington v James, 739 P.2d 1161.

An attorney's duty to advise his client with respect to plea bargaining is set forth in I Amsterdam, Segal, and Miller, Trial Manual for the Defense of Criminal Cases (1967):

> The decision whether to plead guilty or contest a criminal charge is probably the most important single decision in any criminal case. This decision must finally be left to the client's wishes; counsel cannot plead a man guilty, or not guilty, against his will. But counsel may and must give the client the benefit of his professional advice on this crucial decision, and often he can protect the client adequately only by using a considerable amount of persuasion to convince the client that one course or the other is in the client's best interest. Such persuasion is most often needed convince the client to plead guilty in a case where a not guilty plea would be totally destructive.

Napper, Supra at 524.

It has been held that trial counsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial. *Walker v Caldwell*, 476 F.2d 213, 218 (5th Cir. 1973). When a (39) guilty plea is being entered counsel need only provide his client with an understanding of the law in relationship to the facts so

that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial. Id. When the decision is to go to trial, on the other hand, counsel has the added duty to make sure that his client fully understands and appreciates the degree of risk that is involved and the consequences that follow if the plea offer is rejected.

This duty to impart an understanding of a plea offer so that the accused may make an informed judgment has been outlined by the United States Supreme Court in Von Moltke v Gillies, 332 U.S. 708, 721 (1948). In that case the Supreme Court stated that "[t]o impart such an understanding to the accused, counsel *must*, after making an independent examination of the facts, circumstances, pleadings and laws involved, *offer his informed opinion as to what plea should be entered.*" (emphasis added). The record shows that Greenwald made no attempt to fulfill this duty to Boria. Indeed, Greenwald was emphatic that he never "offer[ed] his informed opinion as to what plea should be entered." Id.

Moreover, Greenwald admitted that he conducted no investigation into the facts of the case and simply relied upon what Boria told him before irrevocably rejecting the best plea offer Boria could get. In other words, Greenwald made no "independent examination of the facts." Von Moltke,. supra.

Greenwald testified, and the District Attorney has been arguing, as though the Sixth Amendment requires nothing more from (40) defense counsel than to act as a plea messenger for the prosecution. They want this Court to hold that a criminal defense attorney's duty to his client is fulfilled if all he does is inform his client of what the plea offer is and what sentence he can receive if it is rejected and he looses at trial.

The Fifth Circuit Court of Appeals has made it crystal clear that as far as the federal constitutional right to counsel is concerned, much more is required. Not only must the attorney inform the client of the plea offer, and not only must he offer his

opinion regarding the offer, he must "actually and substantially assist his client in deciding whether to plead guilty." Walker v Caldwell, 476 F.2d 213, 224 (5th Cir. 1973).

In addition to the federal and state case law cited above, the Code of Professional Responsibility and the American Bar Association standards support a duty to advise rule. The Code of Professional Responsibility, EC 7-7, states that "[a] defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable . . ." The pertinent part of the ABA standards suggests that "[a]fter informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome." ABA Standards Relating to the Administration of Criminal Justice, Standard 4-5.1 Advising (1982).

Outside of the authority cited above, all of which require an attorney to advise his client with respect to plea bargaining, (41) the law on this issue is sparse. This is not surprising, for it is *fundamental* that counsel advise his client in the course of criminal proceedings. An attorney may not simply sit back and watch his client make a decision that he, the attorney, has reason to believe will destroy his client's life. If the lawyer is not there to counsel his client on whether to accept or reject a plea offer, it is difficult to justify his being there at all, let alone his taking $8,000.00.[17]

In light of the enormous disparity between the District Attorney's original 1-3 plea offer and the 20 year to life sentence which Boria is currently serving, Greenwald's breach of his

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[17]Of Course, it is only the extraordinary case, such as the one at bar, that this issue would ever arise. Significantly, research has shown that there is currently no case which suggests that either the state or federal constitution does not impose a duty to advise.

ethical obligations and constitutional requirements are particularly intolerable.

POINT II

GREENWALD'S FAILURE TO RECOMMEND ACCEPTANCE OF THE 1-3 PLEA OFFER CONSTITUTED A DENIAL OF BORIA'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Boria asserts that in addition to Greenwald's failing to give any advice, he was denied effective assistance of counsel by Greenwald's failure to recommend that he accept the 1-3 plea offer. This is because Greenwald's failure to recommend acceptance of the 1-3 year offer was patently unreasonable to anyone familiar with the facts and circumstances of this case.

APPENDIX 3 (continued)—Brief to the Appellate Division, Second Department (cover page and table of contents)

SUPREME COURT : STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

- - - -

SUPREME COURT : STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

ORANGE COUNTY
INDICTMENT NO. 88-440

-against-

OSCAR BORIA,

Appellant.

----------x

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APPENDIX 3 (continued) - First Page of June 17, 1994, Letter Application to the Court of Appeals

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June 17, 1994

Honorable Judith S. Kaye
Chief Judge of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Attn: Honorable Donald M. Sheraw
Clerk

Re: *People of the State of New York vs. Oscar Boria*
Orange County Indictment No. 88-246

Dear Mr. Sheraw:

Please take notice that the defendant hereby makes application for a Certificate pursuant to Section 460.20(3-b) of the Criminal Procedure Law and Section 500.10 of the Rules of the Court of Appeals, that in the record and proceedings herein there are questions that ought to be reviewed by the Court of Appeals.

The defendant respectfully requests that the following questions put before the Appellate Division, Second Department, be reviewed:

Question One

Whether the State and Federal Constitutional rights to effective assistance of counsel require that a criminal defense attorney express to his client his opinion as to whether a plea offer should be accepted or rejected?